NOTES OF CASES

What is the Point of Ultra Vires?

How strictly will the courts apply the *ultra vires* principle? To whom is its protection available? These questions are revisited by Mocatta J. in *Bell Houses Ltd.* v. *City Wall Properties Ltd.*[1] The plaintiff, a private company formed for property development,[2] entered into a contract with the defendants to introduce a financier who would provide £1 million short-term credit. The chairman often acquired knowledge of such sources of finance.[3] The company now claimed its fee on the contract, either as commission or as damages in lieu. The defendants replied by arguing that the contract to act, in effect, as a money broker was outside the plaintiff company's powers. Two points arose on this preliminary issue—was it *ultra vires*; and, if it was, could the defendants take the point? Mocatta J. decided them both in favour of the defendants.

The company's objects were largely those of a property development company. There was no clause stating that the sub-clauses of the objects clause were each to stand independently and not to be limited by other sub-clauses; the judge was much affected by the absence of that familiar form of words in adopting a restrictive construction of the general words of the memorandum; for " general words construed literally may mean anything under the sun."[4] But the objects also included power:

> " (c) to carry on any other trade or business whatever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or as ancillary to any of the above businesses or the general business. . . .
>
> (u) to do all such other things as are incidental or conducive to the above objects or any of them."

Sub-clause (u) added nothing to the general law. His lordship agreed that the phrase " in connection with " was the widest in meaning; but he could not accept that the contract fell within the objects even so. For " the mere fact that a contract is entered into to make money out of knowledge acquired in the course of carrying

[1] [1965] 3 W.L.R. 1065; [1965] 3 All E.R. 427.

[2] By Mr. Bell whom the judge described as " at all material times its *alter ego*."

[3] His Lordship decided, though not without doubt, that Mr. Bell acquired his knowledge in his capacity of director. Some nice points remain for decision in this area, see, *e.g.*, *Re European Bank* (1870) 5 Ch.App. 358; *Re David Payne Ltd.* [1904] 2 Ch. 608; and the bizarre decision in *The Birnam Wood* [1907] P. 1, especially in the light of modern development of the *alter ego* doctrine (see Leigh (1965) 28 M.L.R. 584).

[4] Cited by Mocatta J. from Lindley L.J., *Re German Date Coffee Co.* (1882) 20 Ch.D. 169 at p. 188.

on an authorised business does not constitute such a contract one made in connection with such business." [5]

But sub-clause (c) also contained the subjective formula "*in the opinion of the board of directors.*" Use of such subjective tests could in effect destroy the *ultra vires* principle by giving the company the power to do anything which its board thinks desirable or profitable. Other jurisdictions have moved in that direction. For example, in New Zealand the courts have accepted similar clauses,[6] including one empowering the company "to do all such other things as are incidental or as the company may think conducive to the attainment of the above objects or any of them." [7] Such decisions are less surprising in the light of the statutory developments; for in specifying the objects and powers implied into a company's memorandum unless excluded, the New Zealand Companies Act 1955 had apparently accepted the propriety of subjective formulae.[8] The Jenkins Committee recommended that "common form" powers of the kind adopted in some Commonwealth systems should be introduced in England; but the tenor of their discussion makes it plain that they would stop short of the subjective formula.[9] This has always been the English approach. The Companies Acts demand that "certain objects must be specified" and, as North J. put it in 1890, a power "to carry on any business whatever which the company might think would be profitable to the shareholders . . . would not be a statement of the objects of the company as required by the Act of Parliament." [10] Of course, the Act in question there was that of 1862, under which changes in the objects were not allowed.[11] Today, when section 5 of the 1948 Act provides extensive opportunities for such changes,[12] the introduction of subjective formulae might seem the easiest path for those who wish to rid the law of the inconveniences of *ultra vires*. Mocatta J. did not take that path. Indeed, he categorically declared that the subjective phrase "in the opinion of the board of directors" should be ignored in construing the objects clauses.

[5] [1965] 3 All E.R. 427 at pp. 439–440.

[6] See *Christchurch Corporation* v. *Flamingo Coffee Lounge Ltd.* [1959] N.Z.L.R. 986, noted by Prof. Gray (1960) 23 M.L.R. 561.

[7] *C. H. Mitchell Ltd.* v. *Wellington Meat Export Co. Ltd.* [1962] N.Z.L.R. 768, where Spratt J. also treated the managing director as the *alter ego* for the purposes of the company's opinion on such matters.

[8] New Zealand Companies Act 1955, s. 16 and Sched. 2, which sets out the common form powers. The first reads: "To carry on any other business *which may seem to the company* capable of being conveniently carried on in connection with its business or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights" (italics supplied).

[9] Report of the Company Law Committee (1962, Cmnd. 1749), para. 43.

[10] *Re Crown Bank* (1890) 44 Ch.D. 634 at p. 644.

[11] Companies Act 1862, s. 12. See Horrwitz (1946) 62 L.Q.R. 66; Hornsey (1949) 61 Jur.Rev. 263.

[12] The law has changed; but s. 5 still imposes severe restriction on changes: see *Re Hampstead Garden Suburb Trust* [1962] Ch. 806.

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But, given that the contract was " void " for *ultra vires*, could the defendants plead that point against the company, however unmeritorious they might be in so doing? The commentators were divided. Mocatta J. rejected the analogy, advanced by Professor Gower,[13] with infants' incapacity in the law of contract, (" notoriously uncertain " law anyway). He preferred the view, argued by Mr. Furmston,[14] that such a contract being a nullity, either party could raise the point.

> " In short my reasons are that any other conclusion would be inconsistent with the reasoning in the *Ashbury Railway* case that the contract is void and in the eyes of the law non-existent; that to hold a defendant liable under a non-existent contract would be to act contrary to all principle." [15]

His lordship thought the authorities (which are reviewed in Mr. Furmston's article) pointed strongly in that direction too. But, although this may be their tendency, they point mainly by their silences.[16] Some do not touch the point in issue.[17] Others were argued on the basis that the contract before the court was " illegal "; and, in refusing this plea because they were only *ultra vires*, the courts did not always avoid such confusing phrases as that the contract had been made by persons who " had no authority " to do so.[18] Mocatta J. even lingers over a judgment of 1851 in which a *chartered* company had not contracted under seal, a situation in which the defendants could plainly raise the defect, but one widely different from the problem in this case.[19]

[13] *Modern Company Law* (2nd ed.), pp. 90-91. The passage ends by saying that the law on *ultra vires* is obscure; but its argument that the law about infants' incapacity should be regarded as " normal principles " is plainly open to challenge. See, too, Street, *Ultra Vires* (1930), p. 80.

[14] " Who Can Plead that a Contract is *Ultra Vires*? " (1961) 24 M.L.R. 715, where he reviews United States cases, to which might be added *Nettles* v. *Childs* 100 F. 2d 952 at p. 956 (1939).

[15] [1965] 3 All E.R. 427 at p. 435; *Ashbury Railway Carriage & Iron Co.* v. *Riche* (1875) L.R. 7 H.L. 653.

[16] As in *Anglo Overseas Agencies* v. *Green* [1961] 1 Q.B. 1.

[17] Such as *National Telephone Co.* v. *St. Peter's Port Constables* [1900] A.C. 317 (P.C.) where the issue raised in dicta is surely whether a company has sufficient *possession* in property acquired *ultra vires* to sustain an action of trespass (or its Channel Islands equivalent).

[18] Especially *Re Coltman* (1881) 19 Ch.D. 64 (where the court did not even hold clearly that the transaction had been *ultra vires*) and *Brougham* v. *Dwyer* (1913) 108 L.T. 504. Steibel found the latter case " difficult to reconcile with *Sinclair* v. *Brougham* [1914] A.C. 398 ": *Company Law and Precedents* (3rd ed., 1929), p. 51, n. (I). The confusion between *ultra vires* and lack of authority in the directors stems, of course, from the cases that preceded the *Ashbury Carriage* case, such as *Great Eastern Ry.* v. *Turner* (1872) 8 Ch.App. 149.

[19] *Copper Miners of England* v. *Fox* (1851) 16 Q.B. 229. Chartered companies do not suffer from lack of capacity on grounds of *ultra vires* though their members may enjoin an act outside the objects of the charter: see the reaffirmation of this old principle in *Institution of Mechanical Engineers* v. *Cane* [1961] A.C. 696, by Lord Denning. Furthermore, the principles concerning enforcement of contracts to which a seal should have been attached, before the Corporate Bodies Contracts Act 1960, were by no means the same as those concerned with *ultra vires*; see note 28 below.

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It was in the face of such unsatisfactory precedents, and disagreement among the commentators, that the Jenkins Committee was expected to propose a way ahead. For the outsider it did so: where he is willing to perform his side, he should not be prejudiced by the fact that the contract is beyond the powers of the company; he should be entitled to assume that the company and directors have the necessary powers; and even when he has actual knowledge of the memorandum he should be able to enforce the contract if he honestly and reasonably failed to appreciate its effect on the company's powers in regard to his contract. But when it came to the company's position, including such cases as the present, all the Committee recommended was that " there should be no change in the position " ![20] The *Bell Houses* judgment is likely to send commentators back to the Cohen Committee's recommendation in 1945 that *ultra vires* should be totally abrogated as far as outsiders go, and retained only as between the shareholders and directors internally.[21] The arguments in the Jenkins Report against this line of thought are not, on reflection, convincing; and the Board of Trade, after all, omitted it from the 1947 reform largely because, as they put it, of " prevailing pressure of work and the need for rapidly implementing the main recommendations of the Cohen Committee." [22] If *ultra vires* is retained in transactions with outsiders, none of the possible solutions to cases like the present is likely to satisfy everyone. If, as in this judgment, the outsider is allowed to plead it, it will be said that he is allowed to evade obligations which should bind him. If he is not, the company is given an option whether to go on with the contract; if it wishes, it will enforce; if that is inconvenient, it will trumpet its lack of capacity.[23]

The need to reconsider the next reform of the law is reinforced by another point which Mocatta J. left open. The law as so far stated, he thought, could not distinguish between executed and executory contracts. But if there were a claim in quasi-contract, the company might " in an appropriate case " have a remedy.

[20] Report of the Company Law Committee (1962), para. 42 (*a*), (*b*), (*c*) and (*d*).

[21] Report of the Committee on Company Law Amendment (1945, Cmd. 6659), para. 12. See too the United States " Model Business Corporation Act," s. 6. Such solutions do, of course, have to provide specially for certain problems, *e.g.*, the question of constructive notice to outsiders of the memorandum's contents must be regulated; and the situation where a member prevents an *ultra vires* act by injunction to the damage of an outsider.

[22] Report (1962), para. 38. The Board of Trade unhappily published only a much shorter, and less revealing, memorandum in Evidence to the Company Law Committee, Twentieth Day, Appendix LI, p. 1565.

[23] But even so, it must surely remain liable for torts even if they arise from the contract: *cf. Northern Publishing Co.* v. *White* [1940] N.Z.L.R. 75, discussing *Dooland* v. *Midland Ry.* (1877) 2 App.Cas. 792. For the dispute about tort see Gower, *op. cit.*, pp. 91–93. (Surely *ultra vires* cannot affect liability in tort. If the veneered panel factory had by reason of negligence blown up in *Re Jon Beauforte Ltd.* [1953] Ch. 131, neighbouring occupiers of ravaged property would surely not have been remediless.)

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Authority for such actions for money had and received his lordship found in some of the cases already mentioned.[24] Stronger authority for a claim on a quasi-contractual *quantum meruit* basis he found in *Craven-Ellis* v. *Canons Ltd.*[25] No such claim was advanced in this case; and his lordship considered that the right way to make it, if it were to be on a *quantum meruit* basis, would be in a separate action. Nevertheless, he was clearly favourable to the idea of such a remedy. To grant it, however, would be to risk making the law even odder. What a party cannot obtain by enforcing the null contract, he might recover by obligations imposed by the law because he had performed his part of the void obligations. The clash between the historically well-founded view of quasi-contractual claims as based upon " implied contract " and the newly fashionable doctrines of " restitution " would be sharply raised by such a case (as indeed they are, in effect, by the *Craven-Ellis* case itself).[26] In so far as such a remedy would in the circumstances of the present case allow a remedy for executed or partly executed contracts, it is not necessarily to be welcomed if the *ultra vires* doctrine is to be retained as against outsiders. As Mr. Treitel has observed, the situation is not parallel to that in which (under the old law) a contract was enforceable by or against a company which had improperly failed to seal the contract, namely where actual performance by the plaintiff could be shown.[27] Indeed, in such cases the courts took the view that a remedy was available only where the unsealed contract with the company concerned " matters for the doing of which it was created." [28]

Any reform of the law about *ultra vires* must be based upon a clear appraisal of how far the rule is meant to be, and is, today an effective protection for shareholders, creditors or other persons. It must face squarely, if it retains the doctrine at all, the questions when and by whom it can be pleaded. It should, too, illuminate the dark corners of quasi-contractual and tracing claims—for if ever there is an example of case-law at its worst crying aloud for codification, it is the spectre conjured up by the words *Sinclair* v. *Brougham*.[29] Such issues cannot, at least, be ignored after this robust judgment.

K. W. WEDDERBURN.

[24] *Re Coltman* (*supra*); and *Brougham* v. *Dwyer* (*supra*), but Steibel's comment applies with even greater force on this point (note 18, above). Such cases shade off into the problem of " tracing " as in the case cited by Mocatta J., *Tauranga Borough* v. *Tauranga Electric Power Board* [1944] N.Z.L.R. 155.

[25] [1936] 2 K.B. 403. But see Lord Denning (1939) 55 L.Q.R. 54.

[26] But neither that case nor any of the subsequent judgments that support restitution theories involve contracts void for capacity.

[27] *Law of Contract*, p. 382.

[28] *Per* Matthew L.J. in *Lawford* v. *Billericay Rural Council* [1903] 1 K.B. 772 at p. 786; *cf. Hunt* v. *Wimbledon Local Board* (1878) 4 C.P.D. 48.

[29] [1914] A.C. 398; see now the discussion in R. Goff and G. Jones, *The Law of Restitution*, Chaps. 2 and 21.

Since this note was written the case has gone to the Court of Appeal.

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